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FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 21, 1998

AGENDA ITEM

For Meeting of: 10-29-98

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrson
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Paul Sanford
Staff Attorney

SUBJECT: Draft AO 1998-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 29, 1998.

Attachment

1 **ADVISORY OPINION 1998-21**

2
3 **Craig M. Engle**
4 **General Counsel**
5 **National Republican Senatorial Committee**
6 **425 Second Street NE**
7 **Washington DC 20002**

DRAFT

8 **Dear Mr. Engle:**

9 **This responds to your letter dated September 17, 1998 requesting an advisory opinion**
10 **on behalf of the National Republican Senatorial Committee ("NRSC" or "the Committee")**
11 **regarding the application of the Federal Election Campaign Act of 1971, as amended, 2**
12 **U.S.C. §431 *et seq.* ("FECA" or "the Act"), and the Commission's allocation regulations, to**
13 **administrative and get-out-the-vote drive expenses incurred by the Committee during the**
14 **1998 election cycle.**

15 **The NRSC is the national committee of the Republican Party for candidates for the**
16 **United States Senate. Your request indicates that, in addition to supporting Republican**
17 **Senate candidates, the Committee intends to promote the candidacies of a number of non-**
18 **federal candidates during the 1998 cycle. You state that, in accordance with 11 CFR**
19 **102.5(a)(1), the committee maintains separate federal and non-federal accounts in order to**
20 **keep contributions subject to the prohibitions and limitations of the Act separate from other**
21 **contributions that are not so limited. The Committee pays for candidate-specific activities on**
22 **behalf of federal candidates out of the federal account, and candidate-specific activities on**
23 **behalf of non-federal candidates out of the non-federal account.**

24 **Your request also recognizes that the Commission's regulations require the**
25 **Committee to allocate certain expenses between its federal and non-federal accounts in order**
26 **to ensure that non-federal funds are not used to benefit federal candidates. See 11 CFR 106.1**

1 and 106.5. Section 106.5(c) requires the Senate and House campaign committees of a
2 national party to allocate their administrative expenses and generic voter drive costs using the
3 "funds expended" method.¹ Under this method, committees allocate their administrative
4 expenses and generic voter drive costs based on the ratio of federal candidate-specific
5 expenditures to total federal and non-federal candidate-specific disbursements made during
6 the two-year federal election cycle. Thus, if a committee's federal candidate-specific
7 expenditures are 75% of its total combined federal and non-federal candidate-specific
8 disbursements, the committee must pay 75% of its administrative expenses and generic voter
9 drive expenses with federally permissible funds, and is permitted to pay no more than 25% of
10 these expenses with non-federal funds. 11 CFR 106.5(c)(1).

11 Your request is prompted, in large part, by section 106.5(c)(2), which modifies the
12 funds expended ratio by setting a minimum federal percentage for administrative and generic
13 voter drive expenses incurred by Senate and House campaign committees. "Regardless of
14 the allocation ratio calculated under paragraph (c)(1) of this section, each Senate and House
15 campaign committee shall allocate to its federal account at least 65% each of its
16 administrative expenses and costs of generic voter drives each year." 11 CFR 106.5(c)(2).
17 Thus, if the NRSC's ratio of federal candidate-specific expenditures to total federal and non-
18 federal candidate-specific disbursements is less than 65%, the committee must use the 65%
19 minimum federal percentage, and pay no more than 35% each of its administrative and

¹ The Committee's administrative expenses include expenses such as rent, utilities, office supplies, and salaries, other than those expenses directly attributable to a clearly identified candidate. Generic voter drive expenses include the costs of voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 CFR 106.5(a)(2)(i), (iv).

1 generic voter drive expenses with non-federal funds each year. On the other hand, if the ratio
2 is greater than 65%, the Committee must use the calculated ratio.

3 You state that the Committee expects that more than 35% of its candidate-specific
4 disbursements during the 1998 election cycle will be on behalf of candidates for non-federal
5 office. You assert that "application of the minimum federal allocation percentage of 65
6 percent in Section 106.5(c)(2) will result in the NRSC paying a disproportionate share of
7 administrative costs out of federal funds." You seek Commission approval of a plan under
8 which the Committee would "correct any variance between [NRSC's] estimated and actual
9 administrative cost allocation ratios through a single transfer after the November 3, 1998,
10 election." Under your proposed plan, the Committee would use the 65% minimum federal
11 percentage to pay its administrative and generic voter drive expenses during the campaign
12 period leading up to the November 3, 1998 election. Then, after the election, NRSC would
13 calculate its actual ratio of federal candidate-specific expenditures to total candidate-specific
14 disbursements during the election cycle. Based on the actual ratio, the NRSC would then
15 make a transfer from its non-federal to its federal account, or *vice versa*, to ensure that the
16 final allocation of its administrative expenses accurately reflects the actual candidate-specific
17 expenditures made during the election cycle.

18 Assuming your expectations regarding the Committee's spending patterns are correct,
19 the result of this transfer would be that more than 35% of the Committee's administrative and
20 generic voter drive expenses would be paid for with non-federal funds. You state the
21 NRSC's belief that this proposal conforms with the FECA and Commission regulations
22 because it ensures that the Committee's administrative and generic voter drive expense are
23 allocated in proportion to the Committee's actual candidate-specific disbursements. You also

1 state your belief that, by paying no more than 35% of these expenses with non-federal funds
2 during the campaign period, the Committee will ensure that no non-federal funds are used to
3 subsidize the federal account's share of the Committee's campaign activity. You seek
4 Commission approval of this proposal.

5 The Commission is unable to agree that your proposal can be reconciled with the
6 allocation rules. Section 106.5(c)(2) requires the NRSC to pay at least 65% each of its
7 administrative and generic voter drive expenses with federal funds, and prohibits the
8 Committee from paying more than 35% of those expenses with non-federal funds. Thus, the
9 plain language of the rules precludes the Committee's use of an allocation ratio based on its
10 actual candidate-specific disbursements if that ratio would result in the use of less than 65%
11 federal funds or more than 35% non-federal funds for the Committee's administrative and
generic voter drive expenses.

13 Your plan to delay the transfer through which the Committee would reimburse its
14 federal account until after the November election does not make your proposal any more
15 consistent with the current rules. Section 106.5(c)(2) states that "each Senate or House
16 campaign committee of a national party shall allocate to its federal account at least 65% of its
17 administrative expenses and costs of generic voter drives each year." Thus, the minimum
18 federal allocation requirement applies to the total expenses incurred over the course of the
19 calendar year. Consequently, if the Committee's transfer results in the use of non-federal
20 funds for more than 35% of the Committee's allocable expenses, the Committee will have
21 exceeded the minimum federal allocation requirement, even if the transfer does not occur
22 until after the November election.

1 Your request essentially acknowledges that the transfer you propose and the resulting
2 allocation of the NRSC's administrative and generic voter drive expenses would not be
3 consistent with the allocation rules. You cite several prior Commission advisory opinions as
4 situations in which "[t]he Commission has previously deviated from the letter of the
5 allocation rules." You assert that your request is "similar to those that have been granted in
6 the past," and urge the Commission to permit the proposed transfer and resulting allocation.

7 However, the opinions you cite do not serve as justification for allowing the proposed
8 transfer. Advisory Opinions 1991-15, 1992-2, 1992-27, and 1993-3 involved allocation
9 errors made by committees during the 1991-1992 election cycle.² In each case, the
10 Commission allowed the requesting committee to correct those errors by transferring funds
11 from its non-federal to its federal account after the time limit for those transfers had expired.
12 See 11 CFR 106.5(f). However, these transfers deviated from the allocation rules only in the
13 sense that they occurred after the end of the transfer period. None of these transfers enabled
14 the requesting committee to use non-federal funds for a greater percentage of its allocable
15 expenses than was permitted under the ^{applicable allocation} ~~committee's ballot composition~~ ratio. ^{method}

16 In contrast, the transfer you propose would allow the NRSC to use non-federal funds
17 for a greater percentage of its administrative and generic voter drive expenses than is
18 permitted under 11 CFR 106.5(c)(2). This would be a more significant deviation from the

² Advisory Opinion 1991-15 involved a state party committee that had incorrectly calculated its ballot composition ratio for a period early in the 1991-92 election cycle. In Advisory Opinion 1992-2, a national party committee that had characterized certain expenses as administrative expenses under 11 CFR 106.5(a)(2)(i) sought permission to recharacterize those expenses as fundraising expenses under 11 CFR 106.5(a)(2)(ii), and reallocate them using the funds expended method described in 11 CFR 106.5(f). In Advisory Opinion 1992-27, your committee sought permission to correct errors in allocation made during the first fourteen months of the 1992 election cycle. The Committee's request explained that the errors occurred because the committee did not have an accounting and reporting system in place that could accommodate the

received

1 allocation rules than the transfers authorized in the four cited advisory opinions. Thus, these
opinions are distinguishable from your situation.

3 Furthermore, as the language of these four opinions clearly indicates, the
4 Commission's conclusion regarding the allocation rules was directly related to the context in
5 which those opinions were issued. "The Commission's decisions to allow specific
6 retroactive changes recognize that the allocation regulations represent significant revisions to
7 past practice and require a brief period of adjustment, i.e., the current election cycle, by
8 political committees acting in good faith." Advisory Opinion 1992-2. Your request relates
9 to activities during the 1997-1998 election cycle, the fourth cycle since promulgation of the
10 allocation rules. Consequently, whatever flexibility may have been appropriate during the
11 adjustment period is no longer applicable. In Advisory Opinion 1993-3, the last allocation
opinion relating to the 1991-92 cycle, the Commission "note[d] that th[e] request was
13 submitted on December 31, 1992, the last day of the 1991-1992 election cycle, and that the
14 'brief period of adjustment' referenced in Advisory Opinion 1992-2 has now ended."

15 The other two advisory opinions you cite involved the application of 11 CFR
16 106.5(d)(1)(ii) to special elections for federal office. The first sentence of section
17 106.5(d)(1)(ii) states that "[i]n calculating a ballot composition ratio, a state or local party
18 shall count the federal offices of President, United States Senator, and United States
19 Representative, if expected on the ballot in the next general election, as one federal office
20 each."

allocation requirements until March 1, 1992. Advisory Opinion 1993-3 involved a nonconnected committee
that had difficulty understanding the rules when they were first implemented.

1 In Advisory Opinion 1991-6, two Senate seats were to appear on the 1992 general
2 election ballot in the State of California. The Commission concluded that when two Senate
3 seats were "expected on the ballot in the next general election," a state party committee is
4 required to treat the two seats as separate seats in determining its ballot composition ratio.
5 Advisory Opinion 1991-25 involved a special Senate election to be held in November of
6 1991. The state party committees sought guidance on how this election should be factored
7 into their ballot composition ratios. The Commission cited the Explanation and Justification
8 for the allocation rules, which states that the ballot composition method generally covers
9 those years, but also says that the Commission will determine its application to variations on
10 a case-by-case basis. The Commission concluded that the state party committees should
11 derive a separate ballot composition ratio that includes a federal point for the special Senate
12 election, and use that ratio for administrative expenses and generic voter drive costs incurred
13 ~~from~~ from the date of the vacancy in the Senate office to the date of the special election.

14 The Commission's conclusions in these two advisory opinions were not the type of
15 deviations from the allocation rules that would justify the activity you propose. In both
16 cases, the Commission was called upon to apply the allocation rules to situations that the
17 rules did not specifically address. In contrast, you seek relief from the allocation rules in a
18 situation that the rules do specifically address. Consequently, these opinions do not warrant
19 relief from the allocation rules in your situation.

20 Finally, you state your belief that an exception is appropriate in this case because the
21 "factual premise" for the minimum federal allocation requirement is not accurate during the
22 1998 election cycle. Specifically, you assert that the NRSC no longer has the "narrower
23 focus on congressional candidates" referred to in the Explanation and Justification for the

1 allocation rules. *Methods of Allocation Between Federal and Non-Federal Accounts;*
2 *Payments; Reporting*, 55 FR 26058, 26063 (June 26, 1990). The Commission believes that
3 any reassessment of a provision in the regulations is most appropriately performed in the
4 context of a rulemaking proceeding, rather than in response to an advisory opinion request.
5 The Commission is currently engaged in a rulemaking relating to the allocation of expenses
6 by party committees and other entities. *Prohibited and Excessive Contributions; "Soft*
7 *Money"; Proposed Rule*, 63 FR 37721 (July 13, 1998). Consequently, the Commission
8 expects to have an opportunity to re-examine section 106.5(c)(2) in the near future.

9 This response constitutes an advisory opinion concerning application of the Act, or
10 regulations prescribed by the Commission, to the specific transaction or activity set forth in
11 your request. See 2 U.S.C. §437f.

Sincerely,

13
14 Scott E. Thomas
15 Acting Chairman
16
17

18 Enclosures (AOs 1991-6, 1991-15, 1991-25, 1992-2, 1992-27, and 1993-3)